Supreme Court, U.S.
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No. 98-1428

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

HERMAN CORN, Trustee

Petitioner,

v.

CITY OF LAUDERDALE LAKES, et al.

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The Petition for Writ of Certiorari ("the Petition") must be granted because the Petition presents issues decided by the Eleventh Circuit which have not been, but should be decided by this Court. See U.S. Sup. Ct. Rule 10 (c). Through the Brief of Respondents in Opposition, (the "City's Brief"), the City [1]does not address any of Corn's explanations of why the Writ should issue. Indeed, the City does not dispute that the Petition for Writ of Certiorari (the "Petition") presents important questions of federal law decided by the Eleventh Circuit which have been previously identified, and not decided by this Court. Instead, the City simply mischaracterizes the issues presented by the Petition and unsuccessfully argues that the Eleventh Circuit correctly decided these issues. The City's Brief thus fails to overcome the compelling reasons presented by Corn for the granting of the Petition.

A. There are no Procedural Impediments to the Granting of the Petition

1. The Denial of Previous Petitions Has no Bearing on the Granting of the Petition

The City implies that this Court's previous denial of two earlier Petitions for Writ of Certiorari filed at earlier stages of these proceedings provides grounds for denial of the Petition. Clearly, this is not the case. It is well settled that the denial of certiorari imparts no implication or influence

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[1] The defined terms employed in the Petition for Writ of Certiorari shall have the same meaning in this Reply Brief.

concerning the Court's view of the merits. Hughes Tool Company v. Transworld Airlines, Inc., 409 U.S. 363, 365 (1973). Accordingly, the denial of previous Petitions for Writs of Certiorari in this case has no bearing whatsoever on the granting of the Petition.

2. **This Court May Consider Issues Decided in all Corn Appeals.**

Further, contrary to the City's contention, this Court is empowered to consider all issues which were presented to and decided by the Eleventh Circuit throughout the course of these proceedings, and is not limited to considering only the issue decided in Corn V, the most recent appeal to the Eleventh Circuit. See Mercer v. Theriot, 377 U.S. 152, 153 (1964) ("... it is settled that we may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal") ; Urie v. Thompson, 337 U.S. 163, 172-73 (1949) (court's power to probe issues disposed of on appeals prior to the one under review is a necessary correlative of the rule which limited it to the examination of final judgments.); Hamilton-Brown Shoe Company v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). There is no requirement of preserving an issue decided in an earlier appeal by raising it in a later appeal as a condition to this Court granting certiorari to address such earlier decided issues. Accordingly, matters decided by the Eleventh Circuit in Corn III and Corn IV are properly presented to this Court through the Petition. See id.

The cases relied upon by this City regarding the preservation of issues are inapposite. See City's Brief at 15. In each of these cases the issue presented to the Supreme Court had not been preserved for the Supreme Court's

consideration because the issue was never raised in any appeal to the appellate court. See Tennessee v. Dunlop, 426 U.S. 312, 316 (1976) (claim not pleaded in complaint and not considered by district court or court of appeals was not before the Supreme Court on certiorari); Hasty v. United States, 282 US 694, 701-02 (1931) (Supreme Court shall not review issues which were not assigned as error on appeal to the court of appeals or passed upon there); Duignan v. United States, 274 U.S. 195, 200 (1927) (Supreme Court will not consider constitutional issues that were not presented to the court of appeals). Issues must be preserved on appeal; there is no requirement to preserve issues decided on appeal through multiple appeals.

Each of the issues presented in the Petition are properly presented to this Court for consideration.

B. The Petition Presents Important Questions of Federal Law that have not been, but should be, Settled by this Court.

The City wrongfully maintains that Corn has failed to implicate any important federal questions. The City's position is based on its inadvertent or intentional mischaracterization of the issues presented in the Petition, and is implemented through its total disregard of the arguments included in the Petition. The City makes no effort whatsoever to dispute that the Petition indeed presents important questions or federal law that have not been, but which should be, settled by this Court.

1. Questions Framed but not Decided by this Court have been Decided by the Eleventh Circuit in Corn IV.

In this regard, through the Petition, Corn explains that this case presents legal issues regarding the application of the "deprivation of all feasible use of property" rule in taking cases that this Court has identified, without answering in Lucas v. South Carolina Coastal Council, 505 U.S. 103, (1992), and Williamson County Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985). See Petition at i, 17-19. Legal issues which are framed and not decided by this Court, which are then decided by a United States court of appeals certainly qualify as important questions of federal law that have not been, but should be, settled by this Court. Since the City cannot argue to the contrary, it does not make any effort whatsoever to do so. The City does not dispute that two legal issues decided in Corn IV and presented in the Petition have been framed and left unresolved by this Court in Lucas and Williamson County, respectively. Indeed, the City's Brief does not mention Williamson County, and inaccurately cites Lucas for an unrelated legal proposition.

The City's silence on this matter is the loudest affirmation that the Petition raises important federal questions which have not been, and should be decided by this Court.

Instead of arguing whether certiorari should be granted the City simply argues that the Eleventh Circuit's decision in Corn IV is correct. First, this begs the issue of whether the Petition should be granted. See e.g., Ansonia Board of Education v. Philbrook, 479, U.S. 60, 66 (1986) (affirmance of appellate court decision after certiorari granted to consider important questions of federal law presented by appellate court decision).

Further, as a matter of law, Corn IV was correctly decided. In this regard, the City concedes that this Court has held that the deprivation of certain property interests in land have effected a taking even though economically viable uses of the land remained. See City's Brief at 12-13. The City characterizes the property interests involved in these cases as "traditional" property rights, which it distinguishes from more peripheral interests. Id. The City also acknowledges that the property rights which are protected by the 5th Amendment are created and defined by independent sources such as state law. See City's Brief at 14. The City thus acknowledges that traditional property rights in land which are confiscated by a city require payment of just compensation pursuant to the 5th Amendment, even if uses of the land remain, if the property interest taken has been created and defined by sources such as state law.

Under the City's analysis, the legal issue decided by the Eleventh Circuit is that Corn's is not entitled to just compensation for the confiscation of his state law created vested right to build the Project. This important question raised, and not decided, by this Court in both Lucas and Williamson County is presented in the Petition.

2. This Court Should Clarify when the Dolan Rough Proportionality Standard of Review Applies.

Similarly, the City does not argue that clarifying the circumstances under which the rought proportionality standard of review enunciated in Dolan v. City of Tigard, 512 U.S. 374 (1994), is not an important, unresolved question. Instead, the City only wrongfully maintains that the rough proportionality standard does not apply to Corn's claims. See

City's Brief at 14-17. The City concedes that Dolan's rough proportionality standard is applicable when a constitutionally protected property interest is confiscated by a city. See City's Brief at 16. The City simply maintains that the deprivation of a vested right to build a particular project is not such a property interest. Id. Again, the City has narrowed the issue to that identified by Corn in the Petition:

> Is a state created vested right to build a particular project a constitutionally protected property interest for which just compensation is due for its confiscation?

This important federal question should be settled by this Court through the granting of the Petition.

C. Conclusion

The City has not presented any reason whatsoever that the Petition should not be granted and the Writ issued. The Petition presents cogent and compelling reasons why the Writ should indeed issue, identifying important federal questions that have not been, and should be settled by this Court.

Corn is keenly aware of the number of cases which are presented to this Court for review and the small percentage of such cases for which review is granted. The issues presented through the Petition are important, constituting matters for which this Court's direction is sorely needed by governmental entities and landowners throughout the country.

Corn respectively requests that this Court grant the Petition of Writ of Certiorari.

DATED: May 14, 1999

Respectfully submitted,

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